

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BERNARD F. MARCHESE,
Appellant,

v.

DEPARTMENT OF THE NAVY,
Agency.

DOCKET NUMBER
PH07528610209

DATE: MAR 04 1987

Dennis L. Friedman, Esquire, Philadelphia, Pennsylvania,
for appellant.

Robert E. Campbell, Philadelphia, Pennsylvania, for the
agency.

BEFORE

Daniel P. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

OPINION AND ORDER

The appellant petitions for review of the initial decision issued April 29, 1985, that reversed his suspension. For the reasons set forth below, the Board GRANTS the appellant's petition, and REMANDS the case to the Philadelphia Regional Office for further proceedings consistent with this Order.

BACKGROUND

The appellant filed an untimely appeal with the Board's Philadelphia Regional Office contending that he was improperly suspended when the agency placed him on enforced sick leave and would not let him return to work until he provided medical

clearance. Following the parties' opportunity to submit evidence and argument on the issues of timeliness and jurisdiction, the administrative judge reversed the agency action finding the following: (1) Good cause existed for waiving the time limit for the appellant to file his petition for appeal; (2) the appellant's enforced leave constituted an appealable suspension action under *Mercer v. Department of Health and Human Services*, 772 F.2d 856 (Fed. Cir. 1985), and *Thomas v. General Services Administration*, 756 F.2d 86 (Fed. Cir. 1985); (3) the suspension action could not be sustained because the agency failed to provide the appellant with the procedural requirements of 5 U.S.C. § 7513(b); and (4) there was no need to decide the appellant's allegation of handicap discrimination or the question of whether the appellant was ready, willing, and able to work.

ANALYSIS

The administrative judge properly found that he need not determine whether the appellant was ready, willing, and able to work in the context of this appeal.

The Board has recently held that, where an appellant is placed on enforced leave pending inquiry or because the agency believes that the employee's retention on active duty could be injurious to the employee, his fellow workers, or the public, the Board has jurisdiction over the matter as a constructive suspension. See *Passmore v. Department of Transportation*, 31 M.S.P.R. 65, 67 (1986). The Board specifically found that such jurisdiction exists regardless of whether the appellant

has shown that he was ready, willing, and able to work during the period of enforced leave. *Id.* at 67.

In the present case, the appellant was placed on enforced leave pending a medical determination that he could perform his duties because the agency believed that the appellant's erratic behavior posed a threat to fellow employees. Agency File at 27, 32. Thus, the administrative judge correctly determined that the "ready, willing, and able" issue was not determinative of Board jurisdiction. See *Passmore*, 31 M.S.P.R. at 67.

Further, having found that the agency committed harmful procedural error in suspending the appellant for more than fourteen days without following the requisite statutory procedures of 5 U.S.C. § 7513(b), the administrative judge properly concluded that a ruling on the "ready, willing, and able" issue was not necessary with regard to the merits of the appeal either. Once the administrative judge found reversible procedural error, the merits of the suspension were rendered moot. We note, in addition, that if resolution of this issue affects the appellant's back pay entitlement, he may pursue that matter through an enforcement petition. See *Cruz v. United States Postal Service*, 31 M.S.P.R. 458 (1986).

The administrative judge erred in concluding that he need not consider the appellant's handicap discrimination claim once he found that the agency action could not be sustained because of the agency's failure to follow the procedural requirements of 5 U.S.C. § 7513(b) in effecting the appellant's suspension.

We also conclude here, however, that the administrative judge should have considered the appellant's claim of handicap discrimination in connection with his appealable suspension because Congress has expressly mandated at 5 U.S.C. § 7702(a) that the Board render a decision on discrimination allegations raised in connection with otherwise appealable actions.¹ See *Kufel v. United States Postal Service*, 11 M.S.P.R. 633, 638 (1982). Where the Board or its administrative judge finds that an appealable action has occurred, as in this case, he must offer the appellant the opportunity to develop and prove any discrimination claims made, regardless of whether the action may be overturned on procedural grounds alone.²

In reaching this conclusion, we recognize that the Board may have held or implied in other cases that allegations of discrimination need not be addressed where the appeal is decided on other issues. See, e.g., *Valentine v. Department*

¹ The statute provides that "the Board shall . . . decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures" 5 U.S.C. § 7702(a)(1) (emphasis added).


² See 5 C.F.R. § 1201.111(b)(1) (the administrative judge must make "[f]indings of fact and conclusions of law . . . upon all the material issues of fact and law presented on the record). See also *Dennehy v. Veterans Administration*, 27 M.S.P.R. 31, 33-34 (1985) (allegations of discrimination are "material issues" that administrative judges must address under the Board's regulations, as well as the statute).

of Transportation, 31 M.S.P.R. 358, 360-61 (1986); *Morrow v. Department of the Army*, 12 M.S.P.R. 592, 594 (1982). To the extent that these cases may be deemed to hold that the Board and its administrative judges are not required to adjudicate allegations of discrimination raised in connection with certain otherwise appealable actions, they are hereby overruled.

ORDER

Accordingly, we REMAND this case to the Philadelphia Regional Office for further proceedings to allow the appellant the opportunity to develop and prove his handicap discrimination claim, and for findings and conclusions on that issue.

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.